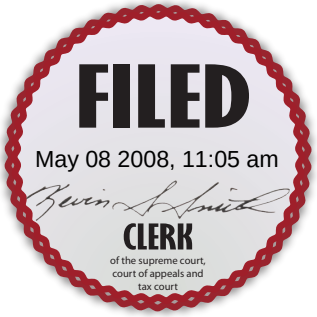

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IN THE
COURT OF APPEALS OF INDIANA

ALLISON HYATT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0705-CR-391
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause Nos. 48D01-0502-FD-56 and 48D01-0404-FD-126

May 8, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Allison Hyatt ("Hyatt") pleaded guilty in Madison Superior Court to two counts of Class D felony possession of cocaine, class D felony resisting law enforcement, Class A misdemeanor resisting law enforcement, and Class A misdemeanor possession of marijuana. Hyatt appeals and claims that the trial court erred in sentencing him to a total of seven years incarceration. The State cross-appeals and claims that the trial court erred in granting Hyatt permission to file a belated notice of appeal and that Hyatt's belated notice of appeal was itself untimely.

We affirm in part, reverse in part, and remand.

Facts and Procedural History

On April 1, 2004, members of the Madison County Drug Task Force were investigating complaints of drug dealing at the home of Hyatt's uncle. After knocking on the front door, the police were invited in. When Hyatt saw the police, he ran, and the police ordered him to stop. Hyatt did not stop but instead ran to the bathroom, where he attempted to place into his mouth a small plastic bag containing cocaine. One of the police officer's grabbed Hyatt from behind and prevented him from stuffing the bag into a heating vent. As a result of this incident, the State charged Hyatt on April 22, 2004, under cause number 48D01-0404-FD-126 ("Cause FD-126"), with Class D felony possession of cocaine and Class A misdemeanor resisting law enforcement. Hyatt was released on bond the day he was arrested, but Hyatt failed to appear at scheduled hearing, and the trial court issued a bench warrant for Hyatt's arrest.

On February 21, 2005, a member of the Anderson Police Department saw Hyatt traveling in a car. Knowing that Hyatt had an outstanding warrant for his arrest, the

officer pulled the car over. Hyatt jumped out of the car and ran, ignoring the officer's commands to stop. While running from the police, Hyatt threw to the ground a glove containing cocaine and marijuana. The police eventually caught Hyatt, and after a physical struggle, subdued him. As a result of this incident, the State charged Hyatt on February 22, 2005, under cause number 48D01-0502-FD-56 ("Cause FD-56") with Class D felony possession of cocaine, Class D felony resisting law enforcement, Class A misdemeanor resisting law enforcement, and Class A misdemeanor possession of marijuana.

On March 1, 2005, Hyatt appeared before the court in both causes, and a jury trial was set for May 31, 2005. On May 10, 2005, Hyatt pleaded guilty as charged pursuant to an agreement with the State, and the trial court scheduled a consolidated sentencing hearing. Hyatt failed to appear at the scheduled hearing, and the trial court issued another warrant for his arrest. Hyatt was arrested on this warrant on August 12, 2005, and the trial court ordered him to undergo psychological and substance-abuse counseling at Richmond State Hospital. On November 23, 2005, Hyatt was discharged from the hospital for failing to complete the program. Upon learning this, the trial court scheduled another sentencing hearing. Hyatt again failed to appear for sentencing, and the trial court reset the hearing again. Predictably, Hyatt again failed to appear, and the trial court issued another warrant for his arrest. Almost one year later, on January 18, 2007, Hyatt was arrested on this warrant, and the trial court scheduled yet another sentencing hearing. At this sentencing hearing, Hyatt actually appeared, and the trial court sentenced Hyatt to

a total of thirty months in Cause FD-126, consecutive to a total of fifty-four months in Cause FD-56, for an aggregate term of seven years.

Hyatt did not timely appeal his sentence. Instead, on March 23, 2005, Hyatt filed a pro se verified petition for permission to file a belated notice of appeal referencing only Cause FD-56. In this petition, after alleging that his failure to timely file a notice of appeal was not his fault and that he had been diligent in requesting permission to file a belated appeal, Hyatt included language typically found in a notice of appeal.[1] The trial court's CCS entry in Cause FD-56 reveals that the trial court granted Hyatt's petition and ordered the court reporter to assemble the relevant materials for appeal. The CCS in Cause FD-126, which was not referenced in Hyatt's petition, understandably does not contain an entry referencing Hyatt's March 23 petition.

On March 10, 2007, CCS entries in both Cause FD-56 and Cause FD-126 indicate that Hyatt sent a letter to the trial court "advising of his desire to appeal and request to have counsel appointed[.]" Appellant's App. pp. 7, 17. The trial court noted that it had already authorized a belated appeal in Cause FD-56 and that counsel has been appointed to assist Hyatt in his appeal in that cause. In Cause FD-126, the trial court's entry states, "Defendant's correspondence appears to be a request to file a belated appeal. Said request granted[.]" Appellant's App. p. 7. The trial court then appointed the same

[1] Specifically, the last portion of Hyatt's petition stated:

> Pursuant to Ind. Appellate Rule 11, the court reporter of the Madison County Superior Court is requested to transcribe, certify, and file with the clerk of the Indiana Court of Appeals the following hearings of record, including exhibits:
>
> 1. All Plea Agreements and any other court records which pertain to such cause.
> 2. The transcript of any hearings, evidentiary or otherwise, held in this matter.
> 3. Any Final Order by the Court in this matter.

Appellant's App. p. 29.

counsel representing Hyatt in his appeal in Cause FD-56 to represent Hyatt in his appeal in Cause FD-126, and ordered that counsel to prosecute an appeal on Hyatt's behalf. On June 21, 2007, seventy-two days after the trial court granted the request for permission to file a belated appeal in Cause FD-126, Hyatt's counsel filed a belated notice of appeal which referenced both Cause FD-56 and Cause FD-126.

I. The State's Cross-Appeal

Before we address the issues presented by Hyatt in his appeal, we address the threshold issues presented by the State in its cross-appeal, i.e., the propriety of the trial court granting Hyatt permission to file a belated appeal and the timeliness of Hyatt's belated notice of appeal.

A. *Belated Appeal*

The State first claims that the trial court erred in granting Hyatt's requests for permission to file a belated notice of appeal. See Post-Conviction Rule 2(1) (setting forth requirements which defendant must establish to obtain permission to file a belated notice of appeal). Despite the State's protestations that Hyatt did not satisfy his burden of showing that he was entitled to a belated appeal, we are compelled to conclude that, pursuant to our supreme court's opinion in Byrd v. State, 592 N.E.2d 690 (Ind. 1992), the State may not now make this argument.

In Byrd, the defendant had been tried and convicted in absentia and sentenced to nineteen years in prison. Thirty months after his conviction, Byrd returned to Indiana and began serving his sentence. He then filed a praecipe to appeal his conviction, which the trial court accepted as a belated praecipe. The State did not object until one day before its

appellate brief was due, when it moved to dismiss Byrd's appeal, arguing *inter alia* that Byrd had failed to proceed in accordance with Post-Conviction Rule 2(1). This court granted the State's motion to dismiss.

Upon transfer, our supreme court held that the State should not have been allowed to assert waiver for the first time on appeal because it had not objected or otherwise presented the waiver issue earlier in the proceedings in the trial court despite having numerous opportunities to do so. Byrd, 592 N.E.2d at 691. The court noted that the State, like all parties, must comply with the applicable rules, including the principles of waiver and estoppel. Id. at 692. "Because the State did not avail itself of . . . several opportunities to challenge the availability and regularity of the belated process, it was in no position to make that challenge in its motion to dismiss. The motion should have been denied." Id.; see also Koenig v. State, 765 N.E.2d 522, 524 (Ind. 2002) (holding that State's inconsistent actions, which included arguing in response to defendant's petition for post-conviction relief that defendant should have filed a belated appeal, in addition to State's failure to object to motion seeking leave to file a belated notice of appeal, warranted reinstatement of appeal after Court of Appeals had dismissed); Greer v. State, 685 N.E.2d 700, 703 (Ind. 1997) (distinguishing but otherwise reaffirming the holding in Byrd).[2] But see Townsend v. State, 843 N.E.2d 972, 975 (Ind. Ct. App. 2006) (dismissing defendant's belated appeal after case was fully briefed where defendant did

[2] The defendant in Greer, unlike the defendant in Byrd, was not eligible to file a belated appeal, because 1994 amendments to Post-Conviction Rule 2(1) removed the trial court's jurisdiction to permit belated appeals in anything other than direct appeals of convictions.

not allege or prove facts required to file belated notice of appeal and did not reply to State's dismissal argument on cross-appeal), trans. denied.

Here, instead of objecting at the trial court level, or even filing a motion to dismiss Hyatt's appeal before the case was fully briefed, the State waited until after the transcript was filed and the case was fully briefed before complaining about the trial court's granting Hyatt permission to file a belated notice of appeal. Based on the holding in Byrd, we conclude that the State may not make this argument at such a late date.

B. *Timeliness of Belated Notice of Appeal*

The State argues that, even if the trial court properly granted Hyatt permission to file a belated notice of appeal, Hyatt nevertheless failed to timely file his belated notice of appeal. Our discussion of this issue is complicated by the fact that the present appeal is taken from both Cause FD-126 and Cause FD-56. With regard to Cause FD-56, Hyatt's March 23, 2007 petition for permission to file a belated notice of appeal contained language typical of a notice of appeal. The trial court understandably treated this as a belated notice of appeal itself and ordered the clerk and court reporter to assemble the record and transcript for appeal. Indeed, our docket shows Hyatt's notice of appeal as being filed on March 23, 2007. We therefore reject the State's claim that Hyatt's belated notice of appeal under Cause FD-56 was untimely.[3]

[3] Although not applicable to Hyatt's case, we note that the 2008 amendments to Post-Conviction Rule 2(1) appear to have anticipated the situation now before us. Post-Conviction Rule 2(1)(f)(1) (2008) provides that if the petition for permission to file a belated notice of appeal includes a proposed notice of appeal as an exhibit, then "an order granting the petition shall also constitute the filing of that notice of appeal in compliance with the time requirements of App. R. 9(A)" Although Hyatt's did not include a proposed notice of appeal as an exhibit, he did include what amounts to a notice of appeal as part of his petition.

With regard to Cause FD-126, appellate status is not as clear. We can say, however, that Hyatt's March 23 pro se petition to file a belated notice of appeal, which referenced only Cause FD-56, cannot also be considered as a petition for permission to file a belated notice of appeal in Cause FD-126. Regardless, the trial court obviously considered Hyatt's correspondence of March 10, 2007 to have been a request for permission to file a belated notice of appeal in both causes. Of course, in Cause FD-56, the belated notice of appeal had already been filed. In Cause FD-126, the trial court granted Hyatt's request and appointed counsel to pursue an appeal in that cause as well. For whatever reason, Hyatt's counsel did not file a belated notice of appeal until June 21, 2007, and when he did so, he referenced both Cause FD-56 and Cause FD-126.

The State now claims that this notice was itself untimely because it was filed seventy-two days after the trial court granted Hyatt permission to file a belated notice of appeal in Cause FD-126. Although the State might be correct under the current version of the applicable rule, we cannot say that Hyatt's notice was untimely under the rule as then written. The current version of Post-Conviction Rule 2(1)(f)(2) (2008) provides that if a petition seeking permission to file a belated notice of appeal does not contain a proposed notice of appeal as an exhibit, then the notice of appeal must be filed within the time limits set forth in Appellate Rule 9(A), i.e. thirty days.[4] The version of Post-Conviction Rule 2(1) in effect in 2007, when Hyatt filed his belated notice of appeal, contains no similar provisions. The 2007 version of the Rule simply says, "If the trial

[4] Appellate Rule 9(A) (2008) says, in relevant part, "[a] party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of final judgment."

court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period." P-C.R. 2(1) (2007). It otherwise contains no explicit time limitation.

Although we do not condone the filing of a belated notice of appeal seventy-two days after the trial court granted permission for such notice to be filed, given the lack of any specific time limitation in the then-applicable version of Post-Conviction Rule 2(1) and our preference for deciding cases on the merits, we cannot say that this delayed filing requires that we dismiss Hyatt's appeal. See Howell v. State, 684 N.E.2d 576, 577 n.1 (Ind. Ct. App. 1997) (noting preference to decide a case on its merits and choosing not to dismiss appeal despite fact that appellant's brief was filed late).

II. Hyatt's Appeal

Hyatt attacks the trial court's sentencing in two respects. He claims that the total of the consecutive sentences imposed in Cause FD-56 exceed the statutory maximum and that his sentences in both causes were inappropriate in light of the nature of the offenses and the character of the offender.

A. *Episode of Criminal Conduct*

Hyatt claims that the total of his consecutive sentences in Cause FD-56 exceeds the statutory maximum allowed for consecutive sentences arising out of a single episode of criminal conduct. See Ind. Code § 35-50-1-2 (2004 & Supp. 2007). The relevant portion of these statutes states that, subject to certain exceptions not applicable here:

> The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except

> for crimes of violence,[5] the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under [the habitual offender statutes], to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

I.C. § 35-50-1-2(c)

Hyatt claims that, under this statute, the total of his consecutive sentences could not exceed four years—the advisory sentence for a Class C felony, which is one class higher than the most serious of the felonies for which he was convicted. Thus, he claims his sentence of fifty-four months, or four and one-half years, must be reduced to four years. The question before us is whether Hyatt's crimes under Cause FD-56 constituted one episode of criminal conduct. If they do, Hyatt is correct.

The State claims that Hyatt's convictions in Cause FD-56 did not arise out of one episode of criminal conduct, citing Ratliff v. State, 741 N.E.2d 424 (Ind. Ct. App. 2000), trans. denied. In Ratliff, a panel of this court held that the defendant's convictions for operating while intoxicated and resisting law enforcement were part of the same episode of criminal conduct, but that the defendant's conviction for possession of marijuana was separate, related only by the fact that the crime was discovered in the course of the police pursuing the fleeing defendant. Id. at 434.

The dissenting opinion in Ratliff, written by the author of this opinion, cautioned that under the majority's view, "every possession offense, by virtue of its non-volitional

[5] There is no suggestion that Hyatt's convictions in Cause FD-56 fit the statutory definition of "crime of violence" found in Indiana Code section 35-50-1-2(a).

nature, will never be part of any criminal episode," in contravention of the language and intent of the controlling statute. 741 N.E.2d at 436 (Mathias, J., dissenting). Subsequent decisions of this court have declined to follow the Ratliff majority's reasoning and have instead adopted the position of the dissent in Ratliff.[6] See, e.g., Cole v. State, 850 N.E.2d 417, 422-23 (Ind. Ct. App. 2006) (agreeing with dissent in Ratliff and holding that defendant's possession of ammonia occurred at the same time and place of his act of fleeing from police and was therefore part of one episode of criminal conduct); Johnican v. State, 804 N.E.2d 211, 218 (Ind. Ct. App. 2004) (agreeing with dissent in Ratliff and holding that were a defendant possesses contraband on his person while he simultaneously commits another criminal offense, the offenses should be considered as a single episode of criminal conduct); see also Massey v. State, 816 N.E.2d 979, 992 (Ind. Ct. App. 2004) (Sullivan, J., concurring) (opining that Ratliff was wrongly decided).

We too decline to follow the logic of the Ratliff majority, and conclude that, as in Johnican, because the defendant here possessed contraband while he simultaneously fled from the police, his convictions for resisting law enforcement, possession of marijuana, and possession of cocaine constituted a single episode of criminal conduct. Therefore, the total of the consecutive sentences for these crimes cannot exceed four years. See I.C. § 35-50-1-2(c). Accordingly, we reverse the sentence imposed by the trial court in Cause FD-56 and remand with instructions that the trial court enter consecutive sentences whose total does not exceed four years.

[6] At least one panel of this court has chosen to follow Ratliff. See Deshazier v. State, 877 N.E.2d 200, 212 (Ind. Ct. App. 2007), trans. denied.

B. *Appropriateness of Sentences*

Hyatt claims that the sentences imposed by the trial court in both Cause FD-56 and FD-126 are inappropriate. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. It is the defendant's burden to persuade us that his sentence is inappropriate. McKinney v. State, 873 N.E.2d 630, 646 (Ind. Ct. App. 2007), trans. denied.

With regard to Hyatt's sentences under Cause FD-56, we have already determined that the trial court erred in imposing consecutive sentences which total more than four years. However, even if the trial court upon remand imposes consecutive sentences totaling four years, we would not consider this to be inappropriate for the reasons we set forth below. For the same reasons, we do not consider Hyatt's two and one-half year total sentence in Cause FD-126 to be inappropriate.

Hyatt's criminal history is, to say the least, lengthy. By our count, he has accumulated nineteen convictions since turning eighteen years of age. Included among these are six convictions for resisting law enforcement and five convictions for possession of marijuana. This is in addition to Hyatt's prior convictions for Class D felony residential entry, Class D felony failure to return to lawful detention, possession of a handgun without a license, possession of a police radio, battery, battery causing bodily injury, disorderly conduct, contributing to the delinquency of a minor, and public intoxication. Moreover, Hyatt was repeatedly offered the privilege of work release and

probation, but violated the terms thereof numerous times. Hyatt apparently learned little from his prior involvement with the criminal justice system, because his convictions in the instant causes repeats his pattern of possession of illicit drugs and resisting law enforcement. Further, we cannot ignore that Hyatt repeatedly refused to appear before the trial court for sentencing in the present case. Given his repeated pattern of disregard for the law, we conclude that the two and one-half year sentence imposed by the trial court in Cause FD-126 was appropriate. We also conclude that, in Cause FD-56, consecutive sentences totaling four years would be an appropriate sentence to impose upon remand.

Conclusion

The State has waived any objection to the propriety of the trial court granting Hyatt permission to file a belated notice of appeal, and we decline to dismiss Hyatt's appeal in Cause FD-126 for failing to file his belated notice of appeal within thirty days of being granted permission to do so. With regard to Hyatt's claims, the total of his consecutive sentences in Cause FD-56 may not exceed four years because his convictions in that cause arose out of one episode of criminal conduct. Lastly, the sentence imposed in Cause FD-126, and the sentence to be imposed by the trial court on remand in Cause FD-56, are not inappropriate given nature of the offense and the character of the offender. The judgment of the trial court is therefore affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., concur.

ROBB, J., concurs with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

ALLISON HYATT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0705-CR-391
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

ROBB, Judge, concurring

I concur with the majority's result that Hyatt's convictions of resisting law enforcement, possession of marijuana, and possession of cocaine constituted a single episode of criminal conduct and Hyatt's sentence therefore cannot exceed four years. However, unlike the majority, I am unwilling to accept a blanket rule that the possession of drugs simultaneously with the commission of other crimes is always part of a single episode of criminal conduct. See slip op. at 11 (citing Johnican and holding that "because the defendant here possessed contraband while he simultaneously fled from the police," his convictions constituted a single episode of criminal conduct); see also Ratliff, 741 N.E.2d at 436 ("Under the majority's rationale, every possession offense, by virtue of its non-volitional nature, will never be part of any criminal episode.") (Mathias, J., dissenting). Instead, I would focus on the language our supreme court emphasized in

Reed v. State, 856 N.E.2d 1189, 1200 (Ind. 2006), and look to the facts of each case to determine whether crimes are of a "simultaneous and contemporaneous" nature.

In Ratliff, the defendant came to police attention on suspicion of drunk driving. When he was apprehended after a police chase, he was found in the possession of drugs. He was charged with operating while intoxicated, operating a vehicle with at least .10% of alcohol by weight in his blood, resisting law enforcement, and possession of marijuana. We held that the defendant's possession of marijuana was a separate and distinct act from his acts of operating while intoxicated and resisting law enforcement. 741 N.E.2d at 434. In Deshazier, the defendant was arrested after officers approached him while investigating a possible car theft and found a handgun in close proximity. The defendant punched one officer and managed to escape from their custody at the scene. Officers found marijuana in the defendant's jacket. We held that the defendant's possession of marijuana was not part of a single episode of criminal conduct as he must have come into possession of the drugs at some point before he encountered the officers. 877 N.E.2d at 212. As the author of both Ratliff and Deshazier, I continue to believe that because the drug offenses in those cases were not part and parcel of the overall criminal conduct, but only incidentally discovered because of unrelated offenses, the drug offenses were not part of a single episode of criminal conduct.

In this case, however, officers originally encountered Hyatt while investigating complaints of drug dealing. Hyatt ran from the officers who then discovered him trying to place a small plastic bag of cocaine in his mouth and in a heating vent. When Hyatt did not appear for a scheduled hearing dealing with these offenses, a bench warrant was

issued for his arrest. An officer encountering Hyatt on the roadway and knowing of the outstanding warrant then tried to arrest him, but Hyatt ran from the officer and threw a glove containing cocaine and marijuana to the ground. Because everything about Hyatt's criminal conduct related to his possession of drugs, I agree with the majority that in this case, Hyatt's crimes are a single episode of criminal conduct.